No. 92-757

IN THE

Supreme Court of the United States

October Term, 1992

BARBARA LANDGRAF,

Petitioner,

vs.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., AND
QUANTUM CHEMICAL CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joint Appendix

DAVID N. SHANE*
BAKER & DANIELS
300 North Meridian St.
(Suite 2700)
Indianapolis, IN 46204
(317) 237-0300

MIKE HATCHELL
GREGORY D. SMITH
TRACY CRAWFORD
RAMEY, FLOCK, JEFFUS,
CRAWFORD, HARPER &
COLLINS
P.O. Box 629
Tyler, TX 75710

Attorneys for Respondent

PAUL C. SAUNDERS*
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

TIMOTHY B. GARRIGAN
STUCKEY & GARRIGAN
2803 North Street
Nacogdoches, TX 75963
(409) 560-6020**

Attorneys for Petitioner

*Counsel of Record
**Additional Counsel for Petitioner
Appear on Inside Cover.

April 30, 1993.

PETITION FOR CERTIORARI FILED OCTOBER 28, 1992
CERTIORARI GRANTED FEBRUARY 22, 1993

RICHARD T. SEYMOUR
MICHAEL SELMI
SHARON R. VINICK
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1400 Eye Street, N.W.
(Suite 400)
Washington, DC 20005
(202) 371-1212

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

The United States District Court for the Eastern District of Texas

07/21/89	Complaint filed
09/08/89	Answer filed
02/04/91	Trial
05/21/91	Findings of Fact and Conclusions of Law
05/22/91	Judgment
06/06/91	Notice of Appeal

The United States Court of Appeals for the Fifth Circuit

04/29/92	Oral Argument
07/30/92	Opinion; Judgment entered

The United States Supreme Court

10/28/92	Petition for Writ of Certiorari filed
12/30/92	Brief for Respondent filed
02/22/93	Petition for Writ of Certiorari Granted

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Barbara Landgraf
vs.
USI Film Products, *et al.*

Trial Exhibit 1-4

January, 1986

11-7 Shift

TO ALL EMPLOYEES IN THE FINISHING AND CONVERTING DEPARTMENTS:

I hope that each and everyone of you that took part in the malicious lies and rumors that you told on me or help to spread will not come back on you some day to hurt you.

The stress that each one of you help to put on me, caused me to leave my job. I hope that each of you can rest easy when you lie down at night and each mouth full of food will go down easily for you! Laugh if you wish and "most of you will."

You see I was trying to help make a living for my family the same as each of you are, but that can be no more. Be careful what you say as your closest friend could turn on you tomorrow and you will be made the outcast.

God be with each of you now as the devil has been your leader so far.

A Former Finishing Dept. Co-worker,

Barbara Landgraf

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

[Title Omitted in Printing]

Trial Exhibit 1-1

Area Code: 214
COM: 214-787-7015
FTS: 729-7015

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DALLAS DISTRICT OFFICE
8303 ELMBROOK DRIVE
DALLAS, TEXAS 75247

September 15, 1988

CHARGE NO: 310 86 3629

Ms. Barbara Landgraf — CHARGING PARTY
408 Audrey
Whitehouse, Texas 75791

U.S.I. Film Products — RESPONDENT
(Bonar Packaging, Inc.)
P.O. Box 818
Tyler, Texas 75710

DETERMINATION

Under the authority vested in me by the Commission I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

All requirements for coverage have been met. Charging Party alleged that she was discriminated against on the basis of her sex,

female, in violation of Title VII, in that she was sexually harassed by a male-co-worker. Additionally, the Charging Party alleged that she resigned her employment because of Respondent's discriminatory work environment.

Sexual harassment is a violation of Section 703 of Title VII, as amended. Section 1604.11(a) of the Commission's Guidelines on Discrimination Because of Sex (Guidelines), 29 C.F.R. 1604.11(a) (1985), defines sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The evidence supports Charging Party's allegation that she was subjected to unwelcome physical conduct of a sexual nature by a co-worker and that the conduct created a hostile and offensive working environment in violation of Title VII. Therefore, there is reasonable cause to believe that the Charging Party was sexually harassed, as alleged, in violation of the Act.

In this case, however, following the reported incident, the Respondent promptly transferred the co-worker away from the Charging Party's work area. The Respondent also issued his written discipline and notified him that a single substantiated complaint or report of such conduct at anytime in the future would result in more severe disciplinary action, including discharge. Thus, Respondent provided remedy on its own initiative. Therefore, although the Charging Party was sexually harassed, there is no additional remedy being sought in resolution of this charge.

The investigation revealed no evidence that the Charging Party was sexually harassed after she complained to the Respondent about her co-worker. The evidence indicates that the Charging Party resigned from her employment because she was unable to get along with other co-workers. Therefore, the Commission does not consider the Charging Party's resignation as constructive discharge.

Based upon the analysis above, I have determined the evidence obtained during the investigation does establish a violation of the statute regarding sexual harassment. However, since the Respondent undertook prompt remedial action, the Commission, accordingly, deems that no additional relief is necessary and the sexual harassment issue is hereby considered resolved.

Based upon the analysis above, I have determined the evidence obtained during the investigation does not establish a violation of the statute regarding Charging Party's resignation (constructive discharge).

This determination does not conclude the processing of this charge. If the Charging Party wishes to have this determination reviewed, she must submit a signed letter to the Determinations Review Program which clearly sets forth the reasons for requesting the review and which lists the Charge Number and Respondent's name. Charging Party must also attach a copy of this Determination to her letter. These documents must be personally delivered or mailed (postmarked) on or before September 29, 1988 to the Determinations Review Program, Office of Program Operations, EEOC, 2401 E. Street, N.W., Washington, D.C. 20507. It is recommended that some proof of mailing, such as a certified mail receipt, be secured.

If the Charging Party submits a request by the date shown above, the Commission will review the determination. Upon completion of the review, the Charging Party and Respondent will be issued a final determination which will contain the results of the review and what further action, if any, the Commission may take. The

final determination will also give notice, as appropriate, of the Charging Party's right to sue.

If the Charging Party does not request a review of this determination by September 29, 1988, this determination will become final the following day, the processing of this charge will be complete, and the charge will be dismissed. (This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission.) FOLLOWING DISMISSAL, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE EFFECTIVE DATE OF DISMISSAL. Therefore, in the event a request for review is not made, if a suit is not filed by December 16, 1988, the Charging Party's right to sue will be lost. The Commission's regulation governing no cause determination are printed in Title 29, Code of Federal Regulations, Section 1601.19.

On Behalf of the Commission:

_____ _____

(Date) Marco Salinas
Acting Director

Enclosure: Information Sheet on Filing
Suit in Federal District Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

[Title Omitted in Printing]

Trial Exhibit 1-3

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20507

TO: U.S.I. Film Products
P.O. Box 818
Tyler TX 75710

May 31, 1989

Charge Number : 310863629

Barbara Landgraf
Charging Party

U.S.I. Film Products
Respondent

DETERMINATION ON REVIEW AND DISMISSAL OF TITLE VII CHARGE

The Commission has reviewed the investigation of this charge of employment discrimination and all supplemental information furnished. Based upon this review, we agree with the determination issued by our field office and hereby issue a final determination that the evidence obtained during the investigation does not establish a violation of the statute. Therefore, the Commission dismisses and terminates its administrative processing of this charge.

As the charge alleged a Title VII violation, this is notice that if the Charging Party wishes to pursue this matter further, (s)he may do so by filing a private action in Federal District Court against the Respondent(s) named above within 90 days of receipt of this Determination.

IF CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST.

On Behalf of the Commission:

Leonora L. Guarraia
Director
Determinations Review Program

Enclosure: Information Sheet on Filing
Suit in Federal District Court

cc: Jacqueline R. Bradley
District Director
Dallas District Office

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

May 22, 1991

BARBARA LANDGRAF	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. TY-89-435-CA
USI FILM PRODUCTS,	§	
QUANTUM CHEMICAL	§	
CORPORATION and	§	
BONAR PACKAGING, INC.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Fed. R. Civ. P. 52(a), the Court enters its Findings of Fact and Conclusions of Law in this action.

I. FINDINGS OF FACT

1. During the course of her employment at USI Film Products ("USI") in Tyler, Texas, Plaintiff Barbara Landgraf ("Landgraf") was subjected to sexual harassment. The sexual harassment consisted of continuous and repeated inappropriate verbal comments and physical contact, the source of which was a fellow employee named John Williams.

2. Landgraf reported the sexual harassment to her immediate supervisor, Bobby Martin, on several occasions.

3. Martin took no actions reasonably calculated to halt the harassment.

4. Landgraf eventually reported the harassment to Sam Forsgard, who handled personnel matters at USI.

5. Forsgard immediately conducted an appropriate investigation into the allegations. Interviews with other female

employees substantiated Landgraf's complaints of sexual harassment by John Williams. After a hearing on the harassment with Williams, he was transferred to another department as a remedial measure.

6. The remedial measures instituted by Forsgard alleviated the harassment Landgraf was subjected to by Williams.

7. Shortly after Forsgard instituted remedial measures regarding the harassment, Landgraf resigned her employment at USI.

8. Landgraf experienced difficulty in getting along with her co-workers. This situation was unrelated to the sexual harassment by John Williams.

9. As evidenced by the language in her resignation letter, Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers.

10. Landgraf suffered mental anguish as a result of the sexual harassment she was subjected to while working at USI.

II. CONCLUSIONS OF LAW

1. A plaintiff must establish five elements in order to state a prima facie case of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*:

(1) The employee belongs to a protected group;

(2) The employee was subject to unwelcome sexual harassment;

(3) The harassment complained of was based on sex;

(4) The harassment complained of affected a "term, condition or privilege of employment"; and,

(5) Respondeat superior, i. e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Waltman v. International Paper Co., 875 F.2d 468, 477 (5th Cir. 1989).

2. Landgraf was subjected to harassment sufficiently severe to alter the conditions of Landgraf's employment and create an abusive working environment sufficient to support Landgraf's "hostile environment" claim. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

3. Bobby Martin held a management position over Landgraf as her immediate supervisor. Landgraf's complaints to Martin constituted actual notice of the harassment to Landgraf's employer, USI. *See Waltman*, 875 F.2d at 478.

4. Because of Martin's repeated failure to take action when Landgraf reported the harassment to him, USI failed to take prompt remedial action to alleviate the sexual harassment to which Landgraf was subjected.

5. The evidence establishes a prima facie case that Landgraf suffered sexual harassment in violation of Title VII.

6. Landgraf was not constructively discharged from her employment with USI. In order to find that Landgraf was constructively discharged as a result of the sexual harassment, the discriminatory working conditions must have been so difficult or unpleasant that a reasonable person in Landgraf's position would have felt compelled to resign. *Borque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65 (5th Cir. 1980).

Although the harassment was serious enough to establish that a hostile work environment existed for Landgraf, it was not so severe that a reasonable person would have felt compelled to resign. This is particularly true in light of the fact that at the time Landgraf resigned from her job, USI had taken steps through Sam Forsgard to eliminate the hostile working environment arising from the sexual harassment. Landgraf voluntarily resigned from her employment with USI for reasons unrelated to the sexual harassment in question.

7. The Court must now decide the issue of whether Landgraf is entitled to any recovery under Title VII in light of the

determinations that Landgraf suffered from sexual harassment during her employment but that such harassment did not result in her discharge or termination, constructive or otherwise. Although the Fifth Circuit has not ruled on this exact point, it has been suggested in *dicta* that in such a situation nominal damages might be awarded as a remedy which would carry with it the awarding of attorney's fees and costs. *Joshi v. Florida State University*, 646 F.2d 981, 991 n. 33 (5th Cir. 1981). At least one other circuit has held that a plaintiff who establishes a prima facie case of sexual harassment can recover damages without a finding that she was discharged. *See Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988).

The statutory language of Title VII provides that "the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . , back pay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). The Seventh Circuit has noted that "[s]ince damages are not equitable relief, most courts have held that damages are not available to redress violations of Title VII that do not result in discharge." *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1184 (7th Cir. 1986) (and cases cited therein).

The Court agrees with the Seventh Circuit's conclusion in *Bohen*:

> We believe the better view, in accord with the majority of decisions, is that no damages are available under Title VII. If Congress wishes to amend the provisions of Title VII to provide a remedy of damages, it can do so. Until then, this court may only enforce the statute as written, and as currently written Title VII does not contemplate damages.

Id.

The Court finds that Landgraf is not entitled to equitable relief because her employment was not terminated in violation of Title VII. The Court further finds that Landgraf is not entitled to recover damages under 42 U.S.C. § 2000e-5(g).

8. Landgraf has conceded that her pendent state claims for intentional and negligent infliction of emotional distress are barred by the applicable statute of limitations.

Accordingly, IT IS ORDERED that Plaintiff's pendent state claims are DISMISSED with prejudice.

9. Costs shall be paid by the party incurring the same.

SIGNED this 20th day of May, 1991.

ROBERT M. PARKER, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Entered May 22, 1991

BARBARA LANDGRAF	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. TY-89-435-CA
USI FILM PRODUCTS,	§	
QUANTUM CHEMICAL	§	
CORPORATION and	§	
BONAR PACKING, INC.	§	

JUDGMENT

IT IS ORDERED that Plaintiff Barbara Landgraf take nothing against Defendants USI Film Products, Quantum Chemical Corporation and Bonar Packaging, Inc.

SIGNED this 20th day of May, 1991.

ROBERT M. PARKER, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Filed June 6, 1991

BARBARA LANDGRAF	§	
	§	
Plaintiff	§	
	§	
v.	§	CIVIL ACTION NO:
	§	TY-89-435-CA
USI FILM PRODUCTS,	§	
ET AL.	§	
	§	
Defendants	§	
	§	

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Barbara Landgraf hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final Judgment and the Findings of Fact and Conclusions of Law entered in this action on the 20th day of May, 1991.

Respectfully submitted,

Stuckey & Garrigan
P.O. Box 631902
Nacogdoches, Texas 75963-1902
(409) 560-6020, Fax: (409) 560-9578

BY: _____
Timothy B. Garrigan
Bar Card No. 07703600

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing Notice of Appeal to defendants' attorneys:

Roger W. Anderson
Conner, Gillen, Yarbrough,
Judd & Anderson, P.C.
Tyler National Bank Building
3301 Golden Rd., Suite 211
Tyler, Texas 75701

David Shane
Betty E. Landis
300 N. Meridian St.
Suite 2700
Indianapolis, Ind. 46204

Tracy Crawford
Ramey, Flock, Jeffus,
Crawford, Harper & Collins
P.O. Box 629
Tyler, Texas 75710

on this the 5th day of June, 1991.

_____
Timothy B. Garrigan

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

STUCKEY & GARRIGAN
LAW OFFICES
2803 North Street
Nacogdoches, Texas

Curtis B. Stuckey
Timothy B. Garrigan

Mailing Address: P.O. Box 631902
Nacogdoches, TX 75963-1902
Telephone: (409) 560-6020
Fax #: (409) 560-9578

February 6, 1992

Honorable Gilbert F. Ganucheau
United States Court of Appeals
600 Camp Street, Room 100
New Orleans, Louisiana 70130

RE: *Landgraf v. USI Film Products, et al.*
No. 91-4485

Dear Mr. Ganucheau:

Recent amendments to Title VII, 42 U.S.C. §2000e *et seq.*, contained in the Civil Rights Act of 1991 may bear on the issues before the Court in the above referenced matter. The Civil Rights Act of 1991 has become law since the briefs of the parties were filed.

Please bring this matter to the Court's attention. Thank you for your assistance in this matter.

Sincerely,

Timothy B. Garrigan

TBG/tt
cc: Mike Hatchell
Tracy Crawford
David N. Shane
Roger W. Anderson

No. 91-4485

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

July 30, 1992

Barbara LANDGRAF,
Plaintiff-Appellant,

v.

USI FILM PRODUCTS, Bonar Packaging, Inc., and Quantum Chemical Corporation,
Defendants-Appellees.

Timothy B. Garrigan, Stuckey & Garrigan, Nacogdoches, Tex., for plaintiff-appellant.

Gregory D. Smith, Mike A. Hatchell, Ramey, Flock, Jeffus, Crawford, Harper & Collins, Tyler, Tex., for Bonar, USI, Quantum.

Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Barbara Landgraf brought suit against her employer asserting sexual harassment and retaliation claims under Title VII. After a bench trial, the district court entered judgment in favor of the defendants. Although the district court found that sexual harassment had occurred, it concluded that Landgraf had not been constructively discharged and therefore was not entitled to any relief under Title VII. Landgraf asserts on appeal that the district court clearly erred in finding that she was not constructively

discharged and that the district court erred in failing to make factual findings on her retaliation claim. She also argues that she is entitled to nominal damages even if she is unable to demonstrate a constructive discharge. Finally, she asserts that the damage and jury trial provisions of the Civil Rights Act of 1991 should be applied retroactively to her case. We affirm the district court's judgment in all respects and find that the Civil Rights Act of 1991 does not apply to this case.

I.

Landgraf worked for USI Film Products in its Tyler, Texas production plant on the 11:00 p.m. to 7:00 a.m. shift. From September 1984 to January 1986, she was employed as a materials handler operating a machine which produced several thousand plastic bags per shift. While she worked at the plant, fellow employee John Williams subjected her to what the district court described as "continuous and repeated inappropriate verbal comments and physical contact." The district court found that this sexual harassment was severe enough to make USI a "hostile work environment" for purposes of Title VII liability. The harassment was made more difficult for Landgraf because Williams was a union steward and was responsible for repairing and maintaining the machine Landgraf used in her work.

Landgraf told her supervisor, Bobby Martin, about Williams' harassment on several occasions but Martin took no action to prevent the harassment from continuing. Only when Landgraf reported the harassment to USI's personnel manager, Sam Forsgard, was Williams' behavior investigated. By interviewing the other female employees at the plant, the investigation found that four women corroborated Landgraf's reports of Williams' engaging in inappropriate touching and three women reported verbal harassment.

Williams denied the charges, contending that "they are all lying." Williams was given a written reprimand for his behavior, but was not suspended, although the written policies of USI list sexual harassment as an action "requiring suspension or dismissal." He was technically transferred to another department,

however, USI officials conceded that he would still be in Landgraf's work area on a regular basis. This transfer was not a form of discipline against Williams; as soon as Landgraf resigned he was transferred back to the original department.

The investigation dealt not only with Williams' behavior but also involved questioning employees about their relationship with Landgraf. On January 13, 1986, Forsgard, Wilson, and Martin met with Landgraf. According to Wilson's notes describing the meeting, Forsgard first told Landgraf that her claim had been investigated and that USI had taken the action it deemed appropriate. The meeting then turned to focus on Landgraf's problems in getting along with her co-workers. She was told that she was very unpopular and was "among [her] own worst enemies." When Landgraf asked whether anything was going to happen to Williams she was told that USI had taken what it considered appropriate action and to notify them if Williams attempted to take revenge.

After working just two more shifts, Landgraf left her job at USI. She left a letter addressed to her colleagues stating that "the stress that each one of you help [sic] to put on me, caused me to leave my job." The letter did not refer to the sexual harassment or to Williams by name. Approximately two days later, Landgraf spoke to her supervisor about her decision to resign and specifically attributed it to the harassment by Williams.

II.

It is uncontested that Barbara Landgraf suffered significant sexual harassment at the hands of John Williams during her employment with USI. This harassment was sufficiently severe to support a hostile work environment claim under Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). She reported this harassment to her employer through supervisor Bobby Martin on several occasions and no corrective action was timely taken.

Because Landgraf voluntarily left her employment at USI, however, she must demonstrate that she was constructively

discharged in order to recover back pay as damages. In order to demonstrate constructive discharge, she must prove that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *Jurgens v. EEOC*, 903 F.2d 386, 390-91 (5th Cir. 1990). The district court found that the sexual harassment by Williams was not severe enough that a reasonable person would have felt compelled to resign. This conclusion was strengthened by the district court's finding that at the time Landgraf resigned USI was taking action reasonably calculated to alleviate the harassment. The district court further found that "as evidenced by the language in her resignation letter, Landgraf's motivation for quitting her employment with USI was the conflicts and unpleasant relationships she had with her co-workers."

Landgraf argues first that the district court clearly erred in finding that USI had taken steps reasonably calculated to end the harassment. We disagree. Our review of the district court's factual finding is limited. As the Supreme Court has recently described the scope of our review: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12, 84 L. Ed.2d 518 (1985). There was evidence that USI had given Williams its most serious form of reprimand and acted to reduce his contact with Landgraf at the workplace. Landgraf testified that Williams continued to harass her after his reprimand, however, she did not report these incidents to USI before resigning. Title VII does not require that an employer use the most serious sanction available to punish an offender, particularly where, as here, this was the first documented offense by an individual employee. The district court did not clearly err in concluding that USI took steps reasonably calculated to end the harassment.

Landgraf argues that the finding of no constructive discharge was clearly erroneous. We disagree. The district court, after

hearing all the testimony in this case, concluded that Landgraf resigned for reasons unrelated to sexual harassment. The evidence in this case presented two possible reasons for Landgraf's decision to resign: problems with her co-workers, as evidenced by her note or sexual harassment as stated in conversation with Bobby Martin. Landgraf testified at trial that the sexual harassment was the reason for her resignation. She also stated that the reference to "the devil [who] has been your leader so far" in her resignation note was actually a reference to Williams. The district court concluded based upon this testimony and the note itself that the problems with her co-workers actually caused her resignation. Given these two plausible interpretations of the evidence, we must affirm the district court's finding. Landgraf also asserts that the conflicts she had with her co-workers were as a result of her problems with Williams. There was conflicting evidence on this question and the district court specifically found that Landgraf's conflict with her co-workers was unrelated to the sexual harassment by Williams. The district court did not clearly err in finding that Landgraf left her employment at USI for reasons unrelated to sexual harassment.

Moreover, even if the reason for Landgraf's departure was the harassment by Williams, the district court found that, particularly in light of the corrective actions taken by USI immediately before Landgraf resigned, the level of harassment was insufficient to support a finding of constructive discharge. To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment. *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir. 1981) (constructive discharge requires "aggravating factors"). The harassment here, while substantial, did not rise to the level of severity necessary for constructive discharge. Although USI's investigation of this incident may not have been overly sensitive to Landgraf's state of mind, the company had taken steps to alleviate the situation and told Landgraf to let them know of any further problems. A reasonable employee would not have felt compelled to resign immediately following the institution of measures which the district court found to be reasonably

calculated to stop the harassment. We cannot say that the district court clearly erred in rejecting the claim of constructive discharge.

III.

Landgraf asserts that the district court erred in failing to make findings of fact and conclusions of law with regard to her retaliation claim against USI. USI argues that no findings on the retaliation claim are necessary because Landgraf failed to prevail on her claim of constructive discharge. We agree.

An adverse negative employment action is a required element of a retaliation claim. *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190, 193 (5th Cir. 1991). The only possible adverse employment action that Landgraf suffered after she complained to Martin about the sexual harassment would be the alleged constructive discharge. Because the district court found that the reason Landgraf resigned her position was her trouble getting along with her co-workers, she cannot prove constructive discharge on the basis of retaliation. As noted above, Landgraf asserts that her troubles with her co-workers were as a result of her complaints about Williams' harassment. However, the district court explicitly found to the contrary and we cannot say that that finding was clearly erroneous. Accordingly, Landgraf's retaliation claim cannot prevail because she suffered no adverse employment action as a result of her complaints. *Collins*, 937 F.2d at 193.

IV.

Landgraf argues that even if she fails to demonstrate that she was constructively discharged, she may still be awarded nominal damages which would carry with them an award of attorneys' fees. We recognize that some confusion may have arisen from our statement in *Joshi v. Florida State Univ.*, 646 F.2d 981, 991 n.3 (5th Cir. Unit B 1981), indicating in dicta that in some cases an employee who suffered from illegal discrimination but was ineligible for back pay might be entitled to nominal damages. Several circuit courts have explicitly held that such nominal

damages are available under Title VII in some cases. *Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900, 905 (11th Cir. 1988); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990). *See also Katz v. Dole*, 709 F.2d 251, 253 n.1 (4th Cir. 1983); *T & S Service Associates v. Crenson*, 666 F.2d 722, 728 n.8 (1st Cir. 1981). Only the Seventh Circuit has directly rejected the award of nominal damages as relief in Title VII cases. *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1184 (7th Cir. 1986).

We conclude that the *Bohen* court's rejection of nominal damages as a Title VII remedy is the correct interpretation of the statutory scheme.[1] Title VII provides that where a court finds that an employer has engaged in unlawful employment practices, it may order action "which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). We have consistently interpreted this provision to mean that "only equitable relief is available under Title VII." *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988). Nominal damages such as those awarded in *Huddleston* and *Baker* are legal, not equitable relief and are therefore outside the scope of remedies available under Title VII. *Bohen*, 799 F.2d at 1184 (damages unavailable to redress Title VII violations that do not result in discharge).

Landgraf also asserts that she is entitled to equitable relief in the form of a declaratory judgment, relying on the Eighth Circuit's opinion in *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985). We conclude that no declaratory judgment is appropriate in this case. The purpose of equitable relief under Title VII is "to restore the victim of discrimination to fruits and status of employments as if there had been no discrimination." *Bennett*, 845 F.2d at 106. Here, because Landgraf voluntarily left her employment she was not deprived of any fruits of employment

---

[1] We note, of course that under the amendments to Title VII in the Civil Rights Act of 1991, remedies will no longer be limited to equitable relief. However, for the reasons discussed below, those amendments do not apply to this case.

as a result of the sexual harassment. Her argument that she is entitled to a declaratory judgment for purposes of vindication because she prevailed on the issue of whether sexual harassment occurred must also fail. *See LaBoeuf v. Ramsey*, 503 F.Supp. 747 (D. Mass. 1980) (allowing declaratory judgment for purposes of vindication). USI did not dispute at trial the fact of Landgraf's sexual harassment. The only issues disputed were the propriety of USI's reaction to the harassment and Landgraf's reason for resigning. Landgraf did not prevail on either of these issues and the district court did not err in refusing to grant a declaratory judgment.

V.

Finally, we address the question of whether any provisions of the Civil Rights Act of 1991 apply to this case. Two provisions of the Act would affect this case if applicable: the addition of compensatory and punitive damages and the availability of a jury trial. Civil Rights Act of 1991, Pub.L. No. 102-166, §§ 102(a)(1), 102(c), 105 Stat. 1072-73 (1991).

We recently addressed the issue of the Act's retroactivity in *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), where we joined the other circuit courts which have ruled on the issue in holding that § 101(2)(b) of the Act does not apply to conduct occurring before the effective date of the Act. *See Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992). We need not repeat here our discussion of the legislative history of the Act. For the reasons explained in *Johnson*, we conclude that there is no clear congressional intent on the general issue of the Act's application to pending cases. We must therefore turn to the legal principles applicable to statutes where Congress has remained silent on their retroactivity.

As we noted in *Johnson* the legal principles surrounding the retroactive application of statutes are somewhat uncertain in light of the Supreme Court's decisions in *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L. Ed. 2d 476 (1974) and

Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). We need not resolve the recognized tension between the *Bradley* and *Bowen* cases, however, in order to resolve the issue facing us here. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837, 110 S.Ct. 1570, 1572, 108 L.Ed.2d 842 (1990). Even under the standard set forth in *Bradley* we conclude that these two provisions of the Act should not be applied retroactively to this case.

The rule set forth in *Bradley* is that a court must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016. In determining whether retroactive application of a statute will wreak injustice, we consider "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Belser v. St. Paul Fire and Marine Ins. Co.*, 965 F.2d 5 (5th Cir. 1992), citing *Bradley*, 416 U.S. at 717, 94 S.Ct. at 2019.

We turn first to the provision allowing either party to request a jury trial. When this case was tried in February 1991, the district court applied the law in effect at that time when it conducted a bench trial on the Title VII claims. We are not persuaded that Congress intended to upset cases which were properly tried under the law at the time of trial. *See Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985) (Court would not presume that Congress intended new grant regulations to govern review of prior grants). To require USI to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted. *Belser*, 965 F.2d 5 at 9.

We now turn to whether the Act's provisions for compensatory and punitive damages apply to pending cases. We conclude that they do not. Retroactive application of this provision to conduct occurring before the Act would result in a manifest

injustice. The addition of compensatory and punitive damages to the remedies available to a prevailing Title VII plaintiff does not change the scope of the statute's coverage. That does not mean, however, that these are inconsequential changes in the Act. As Judge Posner notes in *Luddington*, "such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes." Unlike allowing prevailing plaintiffs to recover attorneys' fees as in *Bradley*, the amended damage provisions of the Act are a seachange in employer liability for Title VII violations. For large employers, the total of compensatory and punitive damage for which they are potentially liable can reach $300,000 per claim. Civil Rights Act of 1991, § 102(b)(3).

The measure of manifest injustice under *Bradley* is not controlled by formal labels of substantive or remedial changes. Instead, we focus on the practical effects the amendments have upon the settled expectations of the parties. There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself. It would be an injustice within the meaning of *Bradley* to charge individual employers with anticipating this change in damages available under Title VII. Unlike *Bradley*, where the statutory change provided only an additional basis for relief already available, compensatory and punitive damages impose "an additional or unforeseeable obligation" contrary to the well-settled law before the amendments. 416 U.S. at 721, 94 S.Ct. at 2021. We conclude that the damage provisions of the Civil Rights Act of 1991 do not apply to conduct occurring before its effective date.

The judgment of the district court is AFFIRMED.